Majlis Peguam Malaysia v Datuk Abdul Rashid Asari

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-419–03 OF 2015
DAVID WONG, UMI KALTHUM AND HASNAH HASHIM JJCA
25 NOVEMBER 2016

Legal Profession — Disciplinary board — Appeal against decision of disciplinary board — Disciplinary board constituted investigating tribunal and disciplinary committee to investigate complaint against respondent — Respondent obtained consent judgment against disciplinary board for report by investigating tribunal be set aside, disciplinary committee to be dissolved and complaint be remitted to investigating tribunal for new report — Disciplinary board constituted new investigating tribunal and found respondent liable — Whether consent judgment nullify first investigating tribunal — Whether disciplinary board acted outside parameters of consent judgment by instituting second investigating tribunal — Legal Profession Act 1976 ss 99 & 100

A complaint was lodged by one Lee Beng Seng on behalf of a company known as Idaman Pelita Sdn Bhd against the respondent, an advocate and solicitor. The disciplinary board ('DB') then constituted an investigating tribunal ('IT') to inquire on the complaint and later constituted a disciplinary committee ('DC') based on the IT's report. Subsequently the respondent obtained a consent judgment ('CJ') against DB which required the IT's report to be set aside, the DC to be dissolved and the complaint to be remitted to the IT to hear the respondent's explanation and to submit a new report. Thereafter, the DB constituted a new IT ('the second IT') and DC which found that the respondent was guilty of the complaint and ordered that the respondent to be suspended for three months. The DB affirmed the decision of the DC and further enhanced the suspension period to six months. Dissatisfied with the decision of the DB, the respondent filed an appeal to the High Court. The High Court found that the DB had acted outside the scope of the CJ when it constituted the second IT and consequently, the High Court allowed the appeal, hence the present appeal. The appellant submitted that the appeal must be allowed as the effect of the CJ was to nullify the first IT and the complaint was never withdrawn, thus there was a continuing obligation on the DB to deal with the complaint. In response, the respondent submitted that the DB had acted outside the parameters of the CJ by instituting the second IT to investigate the complaint against the respondent.

Held, dismissing the appeal with no order as to costs:

(1) There was no mention in the CJ that a new IT be constituted and to start the whole process all over again. By constituting the second IT the DB had acted beyond the scope of the CJ. Hence, the whole process culminating in the decision taken by the DB was flawed. The DB had no jurisdiction to constitute an IT if there was no complaint. The DB had not complied with the provisions of ss 99 and 100 of the Legal Profession Act 1976 to constitute the second IT. The High Court judge was correct in concluding that the DB had no jurisdiction to constitute the second IT. The entire disciplinary process against the respondent after the CJ was tainted and therefore, null and void (see paras 23–26).

[Bahasa Malaysia summary

Aduan dilaporkan oleh seorang bernama Lee Beng Seng bagi pihak syarikat yang dikenali sebagai Idaman Pelita Sdn Bhd terhadap responden, peguambela dan peguamcara. Lembaga tatatertib ('LT') kemudiannya membentuk tribunal penyiasatan ('TP') untuk menyiasat aduan dan kemudiannya membentuk jawatankuasa tatatertib ('JT') berdasarkan laporan IT. Kemudiannya responden memperolehi penghakiman izin ('PI') terhadap LT yang memerlukan laporan IT tersebut diketepikan, JT dibubarkan dan aduan tersebut diremitkan kepada IT untuk mendengar penjelasan responden dan memasukkan laporan baru. Selepas itu, LT membentuk TP baru ('TP kedua') dan JT mendapati bahawa responden adalah bersalah terhadap aduan dan memerintahkan bahawa responden digantung untuk tempoh tiga bulan. LT mengesahkan keputusan JT dan selanjutnya menambahkan tempoh penggantungan kepada enam bulan. Tidak puas hati dengan keputusan LT, responden memfailkan rayuan kepada Mahkamah Tinggi. Mahkamah Tinggi mendapati bahawa LT telah bertindak di luar skop PI apabila ia membentuk TP kedua dan akhirnya, Mahkamah Tinggi membenarkan rayuan, maka rayuan ini. Perayu berhujah bahawa rayuan mesti dibenarkan akibat kesan PI adalah untuk membatalkan TP pertama dan aduan tidak pernah ditarik balik, oleh itu terdapat tanggungjawab berterusan ke atas LT untuk berurusan dengan aduan. Dalam menjawab, responden berhujah bahawa LT telah bertindak di luar parameter PI dengan memulakan TP kedua untuk menyiasat aduan tersebut terhadap responden.

Diputuskan, menolak rayuan tanpa perintah kepada kos:

(1) Tidak terdapat apa-apa rujukan di dalam PI bahawa TP baru akan dibentuk dan untuk memulakan proses keseluruhan sekali lagi. Dengan membentuk TP kedua, LT telah bertindak di luar skop PI tersebut. Maka, proses keseluruhan berkesudahan dalam keputusan yang diambil

oleh LT adalah cacat. LT tidak mempunyai bidang kuasa untuk membentuk TP jika tidak terdapat aduan. LT tidak mematuhi peruntukan ss 99 dan 100 Akta Profesion Undang-Undang 1976 untuk membentuk TP kedua. Hakim Mahkamah Tinggi adalah betul dalam memutuskan bahawa LT tidak mempunyai bidang kuasa untuk membentuk TP kedua. Keseluruhan proses tatatertib terhadap responden selepas PI dicemar dan oleh itu, adalah batal dan tak sah (lihat perenggan 23–26).]

Notes

For cases on appeal against decision of disciplinary board, see 9 *Mallal's Digest* (5th Ed, 2015) paras 1512–1513.

Legislation referred to

Legal Profession Act 1976 ss 99, 100, 100(1), 101, 102(2), 103B, 103D, 103D(2), 103E(6)

Appeal from: Originating Summons No 17D-26–06 of 2014 (High Court, Kuala Lumpur)

Wong Leong Hong (The Law Office of LH Wong) for the appellant.
Kamarul Hisham Kamaruddin (Hasnal Rezua Merican and Ruzaini Zulkifli) (The Chambers of Kamarul Hisham & Hasnah Rezua) for the respondent.

Hasnah Hashim JCA:

[1] This appeal relates to a decision of the High Court which had allowed the respondent's appeal against the decision of the disciplinary board ('DB') given on 16 May 2014 affirming the disciplinary committee's findings on liability ('DC') and ordered that the respondent be suspended from practice as an advocate and solicitor of the High Court in Malaya for a period of six months.

[2] We had, after hearing submissions from both counsel dismissed the appeal. Our reasons are set out below.

BACKGROUND

[3] By an originating summons dated 23 June 2014 ('OS') the respondent sought, amongst others, for leave to appeal against the decision of the DB given on 16 May 2014. The appeal before the High Court was made pursuant to s 103D of the Legal Profession Act 1976 ('the LPA'). The respondent sought for a consequential order that the decision of the DC made on 14 May 2013 which

had recommended that the respondent be suspended from practice as an advocate and solicitor for three months be set aside by the High Court.

[4] By an originating summons dated 16 July 2006 the Bar Council of Malaysia applied for leave to intervene pursuant to s 103E(6) of the LPA. Leave to intervene was granted on 6 April 2014.

[5] Idaman Pelita had filed a civil suit against the respondent vide High Court Shah Alam Civil Suit No 22–278 of 2003 ('the MTSA Suit').

[6] On 23 March 2006 a complaint was lodged against the respondent by one Lee Beng Seng/the defendant on behalf of Idaman Pelita Sdn Bhd. The DB had vide a letter dated 23 August 2006 constituted an investigating tribunal ('IT') to inquire into the complaint pursuant to s 100(1) of the LPA. By a letter dated 29 June 2007, the DB affirmed the report of the IT and constituted a DC to formally investigate the complaint under ss 102(2) and 103B of the LPA.

[7] Pending the inquiry by the DB the respondent commenced an originating motion against the DB vide Originating Motion No R2–17–92 of 2007. On 20 May 2008, a consent judgment ('CJ') was entered into by the parties with the following terms:

(a) the report by the IT dated 1 March 2007 to be set aside;

(b) the DC appointed to investigate the complaint to be dissolved; and

(c) the complaint to be remitted to the IT to hear the respondent's explanation and to submit a new report.

[8] On 15 October 2010, the DB constituted and appointed a fresh IT ('second IT') to investigate the complaint lodged by the defendant against the respondent/plaintiff. On 30 September 2010 the MTSA Suit was dismissed by the Shah Alam High Court. An appeal was lodged by the defendant/Idaman Pelita to the Court of Appeal against the said decision. The Court of Appeal allowed Idaman Pelita's appeal. The respondent who was the defendant in the MTSA Suit dissatisfied with the decision of the Court of Appeal filed for leave to appeal on 25 November 2011 to the Federal Court against the decision of the Court of Appeal. The leave application was heard and dismissed by the Federal Court.

[9] On 23 November 2010, the second IT produced a report ('second IT's report') recommending that a formal investigation was unnecessary. By a letter dated 26 April 2011 the parties were informed that the DB disagreed with report of the second IT and decided to constitute a DC to conduct a formal

investigation against the respondent.

[10] On 31 May 2012 a DC was constituted by the DB to inquire into the defendant's complaint against the plaintiff/respondent. The DC in its report dated 14 May 2013 unanimously found that the conduct of the respondent was unbefitting of an advocate and solicitor and recommended to the DB that the respondent to be suspended from legal practice for a period of three months.

[11] On 16 May 2014 the DB made an order pursuant to ss 103D and 103D(2) of the LPA affirming the findings of the DC. However, the DB did not agree with the three month suspension from legal practice recommended by the DC and decided to enhance the period of suspension from three months to six months.

THE HIGH COURT'S DECISION

[12] The learned High Court judge was of the considered view that the terms of the CJ envisaged that the matter be referred to the first IT constituted to hear the explanation of the respondent and for that IT to prepare a fresh report. The language of the CJ was clear and explicit and did not envisage a situation that a new IT was to be constituted in order to commence the whole process all over again. The terms of the CJ had clearly stated that the complaint was to be remitted to the IT for a fresh report to be issued. If that was the intention of the parties that the first IT be dissolved then the CJ would have expressly provided this term in the CJ in the same manner that was provided for the dissolution of the DC.

[13] By a letter dated 12 June 2008 issued by the DB to the respondent/plaintiff and the defendant the DB informed both the parties that the purpose of the setting up of the second IT was only to give the respondent the opportunity to be heard. However, despite what was clearly stated in the said letter the DB decided to start the process all over again.

[14] The DB had acted outside the scope of the CJ when it decided to constitute a second IT for the complaint to be heard all over again, irrespective of what the outcome of the second IT was, in this case the second IT found in favour of the respondent. The second IT was wrongly constituted making the whole process that flowed from the decision of the DB to constitute the second IT leading to the imposition of six months suspension from practice by the DB on the respondent a nullity. The decision of the DB to constitute the second IT to investigate the complaint, the commencement of the investigation, the reporting of the findings of the second IT of its investigations to the DB, the DB's decision not to accept the second IT's findings, the constitution of the

DC by the DB, the finding of guilt by the DC and the recommendation by the DC for the penalty of six months' suspension from practice to be imposed on the respondent were all tainted with illegality.

[15] The learned High Court judge found that the entire disciplinary process against the respondent after the event of the consent order was infected with jurisdictional error.

SUBMISSION OF PARTIES

[16] Before us, the appellant submitted that the appeal against the learned judge's decision should be allowed as the effect of the CJ was to nullify the first IT's report. The complaint was never withdrawn therefore there is a continuing obligation on the DB to deal with the complaint.

[17] Learned counsel argued that s 100 of the LPA makes it mandatory for the DB to constitute an IT if there is merit in the complaint and report its findings to the DB. The provisions of the LPA are clear requiring the DC to consider the report of the IT and for the DC to carry out formal investigations.

[18] It was further submitted that the intention and the scheme of the disciplinary procedure as set out in the LPA (pre-amendment) are clear that there must be formal investigation conducted by the DC.

[19] Learned counsel for the respondent submitted that the DB had in fact acted outside the parameters of the CJ by instituting the second IT to investigate the complaint against the respondent.

OUR FINDINGS

[20] At the conclusion of the appeal, after careful consideration of the oral and written submission of learned counsel for the appellant and the respondent and having perused the appeal records, we found no reason to disturb with the decision of the High Court, in allowing the respondent's appeal.

[21] The basis of the complaint against the respondent was on the interpretation of the terms of the 'stakeholding' and 'undertaking'. The High Court in the MTSA Suit had decided that the terms stated in the board resolutions dated 21 June 1999 did not form part of the stakeholding. The findings of the High Court in the said suit had not been disturbed, set aside and/or altered by the Court of Appeal.

[22] The learned High Court judge had correctly applied the law. The amendments to the LPA was made in 2006 and the enforcement date of the

amended Act was on 2 October 2006. The complaint in this appeal was lodged on 23 August 2006, which was before the coming into force of the amended law. The first IT was constituted before the coming into force of the amended law and therefore the pre-amended law would be applicable.

[23] The words used in the CJ clearly stated that the report by the IT dated 1 March 2007 to be set aside and for the DC appointed to be dissolved. The complaint to be remitted to the IT to hear the respondent's explanation and to submit a new report. There was no mention in the CJ that a new IT be constituted and to start the whole process all over again. By constituting the second IT the DB had acted beyond the scope of the CJ. Hence, the whole process culminating in the decision taken by the DB on 16 May 2014 was flawed.

[24] Sections 99 and 100 of the LPA and provide for the procedure to be adopted by the DB in cases where an application or complaint concerning the conduct of an advocate and solicitor and/or a pupil is made to the DB. Section 101 of the LPA provides that the jurisdiction of the IT to investigate into an application or complaint into the conduct of an advocate or solicitor or pupil can only be triggered when the DB receives a complaint which it considers meritorious. The DB has no jurisdiction to constitute an IT if there is no complaint.

[25] In the instant case the DB had constituted the first IT pursuant to s 100(1) of the LPA. The first IT had completed its investigation and reported its findings to the DB. The report was however, set aside pursuant to CJ due to procedual infringement. The second IT had acted pursuant to the same complaint which had been acted upon by the first IT. There was no new complaint referred to the DB for the DB to consider. The DB had not complied with the provisions of ss 99 and 100 of the LPA to constitute the second IT. The High Court judge was correct in concluding that the DB had no jurisdiction to constitute the second IT.

[26] We, therefore, agree with the High Court judge that the entire disciplinary process against the respondent after the CJ was tainted and therefore, null and void.

CONCLUSION

[27] We, therefore, dismissed this appeal for the reasons stated above. We made no order as to costs. The deposit for the appeal was refunded.

Appeal dismissed with no order as to costs.

Reported by Dzulqarnain Ab Fatar